No. 87-1118

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ROSEMARY BELFIORE, d/b/a NUTMEG NEWS, MURRAY BERMAN, d/b/a BERMAN NEWS SERVICE and MURRAY'S NEWS SERVICE, BROOKWOOD SERVICES CORPORATION, GREENACRES COM NEWS LTD., GROVE NEWS SERVICE, INC., ZIGMUNT POPLASKI, d/b/a Z & J NEWS SERVICE, RICHARD RITTER, d/b/a GREENFIELD HILLS NEWS SERVICE, and ERIC SCOTT, d/b/a NEW CANAAN/SCOTTY'S NEWS SERVICE,

Petitioners,

—v.—

THE NEW YORK TIMES COMPANY and MCI CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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January 28, 1988

QUESTION PRESENTED

Whether this Court should review the lower courts' grant of summary judgment dismissing petitioners' Sherman Act claims (attacking a newspaper publisher's home distribution of its own newspaper) when:

(a) the decision below follows an unbroken line of cases rejecting similar claims;

(b) summary judgment was granted only after petitioners had years of extensive discovery, and yet failed to show a genuine issue of material fact requiring a trial; and

(c) the courts below placed no reliance on any finding or recommendation of the special master, and unanimously found that petitioners' attack on the special master (repeated in this Court) was unfounded in fact and in law.

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STATEMENT OF THE CASE

A. The Antitrust Case

Respondent The New York Times Company ("The Times") owns and publishes *The New York Times*. For many years it sold its newspaper to wholesalers, who in turn sold to retail outlets (newstands and independent home delivery dealers such as petitioners).

Prior to 1982, petitioners enjoyed "mini-monopolies" on home delivery of The Times in their respective territories (App.

13).[1] In September 1982, in response to a serious decline in home sales over the preceding four years, The Times expanded its own home delivery system (the "T-Route" system) to supplement (but not supplant) sales by independent dealers (JA 1953-57).[2] The downward trend in The Times' home delivery circulation was a matter of critical concern to it because advertising revenue, which accounts for 80 percent of The Times' income, depends on circulation volume (JA 1952). The T-Routes offered potential home subscribers an alternative to the service provided by the petitioners, who are still able to purchase *The New York Times* at wholesale rates and resell it at a profit (JA 1955). As anticipated, this alternative service resulted in a number of new home delivery customers and an overall increase in home delivery circulation, while sales by independent dealers still account for most of that circulation (JA 1956-57).

Both before and after 1982, petitioners' prices for home delivery varied widely but were all substantially higher than The Times' home delivery prices and were periodically increased despite The Times lower prices (JA 2087).

Petitioners sued to enjoin competition from T-Routes on a full panoply of antitrust theories, including monopolization, attempt to monopolize, conspiracy to monopolize and to restrain trade,[3] and vertical price fixing (JA 38-39). After years

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1 The following abbreviations will be used in this brief: "Pet'n" for citation to the Petition for a Writ of Certiorari, "App." for citation to the opinions below reprinted in the Appendix to the Petition, and "JA" for citation to the joint appendix below.

2 Previously, T-routes were used only in those areas not serviced by independent dealers (JA 1949).

3 The Times' alleged co-conspirators are the independent contractors responsible for certain T-Route operations, such as delivery to T-Route carriers and telephone solicitation. One such agent is respondent Callcenter Services, Inc. ("CSI", formerly known as MCI Corporation), a telephone marketing company that handles incoming calls regarding T-Route operations (JA 2029).

of extensive discovery, during which tens of thousands of pages of deposition testimony and documents were amassed, the district court (Hon. Robert C. Zampano, Jr.) granted summary judgment. In affirming that ruling, the court of appeals observed: "Plaintiffs' real complaint is that competition from The Times is pressuring them to lower their prices. Such competition is precisely the conduct the antitrust laws were designed to foster, not suppress." (App. 9, citing *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977))

With respect to petitioners' monopolization claim, the court below agreed with the district court's finding that petitioners' product market definition ("general interest daily newspapers directed primarily to upscale readers") "is an awkward attempt to conform their theory to the facts they allege; *this market theory does not reflect any relevant market evidenced in the record*" (App. 6; emphasis added). Moreover, as the court stated:

> "[P]laintiffs failed to counter the Times' evidence that it does not possess a monopoly in Fairfield County. The Times produced uncontradicted evidence that *The New York Daily News* and *The New York Post* have greater circulation than *The New York Times*. J.App. at 1950-51. The district court's holding that the Times does not possess monopoly power in this market is not error." (App. 7)

Turning to an alternative market definition proffered by petitioners for the first time on appeal (*i.e.*, "the market for the sale of newspaper advertising throughout the New York metropolitan area"), the court resoundingly rejected petitioners' claim that the T-Route system would eventually deprive other publishers of the ability to have their newspapers home delivered. Noting that T-Route carriers were free to handle competing newspapers, and that many of The Times' competitors had already adopted direct delivery systems, the court said:

> "Assuming *arguendo* that plaintiffs' theory should be heard for the first time on appeal, we reject it. Plaintiffs failed to offer any proof whatsoever that the Times' publishing competitors could not, in the absence of independent dealers, deliver their own newspapers directly to home subscribers." (App. 7-8)

Finally, the court concurred in the district court's ruling that "vertical integration, even by a monopolist publisher, 'does not, without more, offend Section 2' " of the Sherman Act, citing prior decisions in the First, Second, Eighth and Ninth Circuit Courts of Appeals (App. 8).[4]

In affirming summary judgment for respondents on petitioners' vertical price fixing claim, the court indicated that petitioners' deposition testimony, as well as their widely varying (but consistently higher than T-Route) prices, affirmatively demonstrated that no coerced pricing had occurred (App. 9).[5] It also noted that any pressure on prices resulting from The Times' competition was fully consistent with the purposes of the antitrust laws (*id.*).

With respect to petitioners' conspiracy claims, the court ruled that summary judgment was properly granted because "[t]here simply is no evidence of concerted behavior" between The Times and its wholesalers (App. 13), and the only evidence cited as to CSI "simply does not ' "tend[ ] to exclude the possibility' that the alleged conspirators acted independently' ", and cannot give rise to a reasonable inference of conspiracy" (App. 12-13; citations omitted).

The court ruled, moreover, that petitioners had failed to show that the alleged conspiracy was anticompetitive in effect either in the home delivery market or the newspaper advertising market. It concluded:

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4 The court deemed petitioners' attempt to monopolize claim abandoned, since it was not pursued on appeal (App. 8).

5 As the petitioners state here, "The dealers set their own prices" (Pet'n 9).

> "The uncontroverted evidence establishes that the T-Routes *created* competition in the home delivery market; prior to the Times' entry, plaintiffs enjoyed complete monopolies in their respective exclusive territories. As to possible anticompetitive consequences at the publishing level, plaintiffs' claims rest solely on the speculation rejected [in connection with their abuse of monopoly claim]. There is no evidence of a restraint on the distribution of newspapers at any level." (App. 13; emphasis in original)

The court found no abuse of discretion in the district court's denial of petitioners' discovery requests and noted that, despite having the opportunity to do so, petitioners had failed to follow Fed. R. Civ. P. 56(f), which requires an affidavit describing the nature of requested discovery and why it is needed in opposing summary judgment. (*See* App. 14-15.)

B. Petitioners' Allegations Regarding the Special Master

As the court of appeals recognized, Special Master Kenneth D. Wallace had no role in the trial court's consideration of the merits of petitioners' case or the grant of summary judgment (App. 17). It is clear from the district court's opinion itself that the trial court did not rely on any factual findings or legal conclusions made by him. Instead, his role in the litigation had "ceased long before the argument and submission of defendants' summary judgment motion", and was at all times limited to mediating discovery disputes, occasionally ruling on them subject to *de novo* review by the court, and assisting the parties in refining their respective positions on disputed issues (App. 15-17). While the summary judgment opinion mentions the special master twice in passing, these references are to records of statements made by *petitioners*, which petitioners have never contended were incorrect. (*See* App. 17, 22, 34.)

Petitioners nevertheless seek vacatur of the judgment on the basis of the special master's alleged "economic relationship" with The Times' counsel, Cahill Gordon & Reindel (Pet'n 3). That "relationship" consisted principally of Mr. Wallace's

former employment as an associate at Cahill Gordon, ending some twenty-three years before his appointment in this case (JA 1570). That prior employment was admittedly known to petitioners' counsel when they *themselves* nominated Mr. Wallace.[6] Petitioners also point to Mr. Wallace's subsequent employment by an intermittent client of Cahill Gordon (again, decades before his appointment in this case) and the fact that Mr. Wallace served as Cahill Gordon's local counsel on a litigation (the *M&R* case) that was settled by Cahill Gordon shortly thereafter (JA 1571, 1576). This too was disclosed to petitioners' counsel before they consented to the special master's appointment (JA 1475-76, 1494), and not challenged until years later when petitioners argued that their consent to his appointment was ineffective because disclosure to their counsel by telephone and before Judge Zampano in chambers was not "record disclosure" (JA 1428 *et seq.*).

Petitioners' final assertion, that Mr. Wallace was "employed and paid by Cahill Gordon to perform legal services as local counsel in the '*Caspray*' case" during his term as special master (Pet'n 3), is a gross distortion. Shortly after his appointment, Mr. Wallace was asked to arrange service in Connecticut of a deposition subpoena on an emergency basis in connection with a case pending in the Southern District of New York, where Cahill Gordon's offices are located (JA 1485, 1577). That courtesy, for which he received $500 for his time and expenses, was Mr. Wallace's only contact with the case (JA 1577). It was unknown to any of the Cahill Gordon or Times lawyers working on this case until after the fact, when it was disclosed (JA 1485).

The special master was appointed, with the consent of all parties, in January 1983 (JA 132). He served without objection until January 1984, when petitioners made their first of four

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6 Judge Zampano recalled that Mr. Wallace (whom he had not met previously) was nominated for special master by petitioners' local counsel (JA 1495). The latter stated that he had satisfied himself at the time that Mr. Wallace's relationship with Cahill Gordon would not interfere with his ability to be fair and impartial in this case (JA 1486-87).

unsuccessful motions to revoke his appointment. (*See* JA 811 *et seq.*) Initially, they alleged inability to afford their share of the special master's fees (JA 811-44) and expressly disclaimed any criticism of Mr. Wallace's integrity or professional performance (JA 834). In their second motion, filed eight months later, petitioners argued that the special master's appointment deprived them of their right to a hearing before an Article III judge (JA 1070-84), even though Mr. Wallace was never empowered to issue final rulings. Again they made no mention of Mr. Wallace's previously disclosed relationship with Cahill Gordon.

Petitioners did not raise that relationship until December 1984, more than two years into the litigation, when they moved to vacate the special master's appointment on the ground that it created the appearance of partiality. (*See* JA 1355-59.) At the same time, they also moved for Judge Zampano's recusal because of his *ex parte* contacts with the special master in the normal course of their judicial duties in this case (*id.*); although that motion was denied as "bordering on the frivolous", the same argument was raised in petitioners' notice of appeal, and later abandoned. (*See* JA 1409-12, 1414-15, 1492.)

More than a year later, on January 22, 1986, petitioners again challenged the special master's appointment in response to Mr. Wallace's application for fee payments unilaterally withheld by petitioners. At that time Judge Zampano conducted an evidentiary hearing at which petitioners were permitted to examine Mr. Wallace under oath about his relationship with Cahill Gordon. (*See* JA 1454 *et seq.*) After considering testimony on all of the matters complained of in this Petition, the court rejected as "insubstantial" petitioners' objections to Mr. Wallace's appointment (JA 1496-97). Judge Zampano ruled that the only aspect of Mr. Wallace's relationship with counsel that was "arguably" material was his service as local counsel in the *M&R* case, which had been disclosed prior to his appointment as special master (JA 1496).

Nevertheless, petitioners again moved for disqualification of the special master in February 1986—ten months after the summary judgment motion was made, and on the eve of argument. (*See* JA 1428-29.) As here, petitioners argued that their consent to Mr. Wallace's appointment had been ineffective because the disclosures about Mr. Wallace's association with Cahill Gordon had not been made on the record. After the court's decision granting summary judgment, in which the special master was not involved, the motion was denied as moot (JA 1632).

On appeal, petitioners renewed their arguments about the special master's alleged bias and the informality of the disclosure about his contacts with Cahill Gordon. After careful examination of these claims, the court below concluded that "[i]n total, Mr. Wallace's relationship with Cahill Gordon did not rise to the level requiring disqualification or *vacatur*", and that petitioners had "wholly fail[ed] to offer an intelligible basis for their claim that the relationship tainted the district court's judgment" (App. 17). At the same time, the court noted that "failure to make record disclosure . . . hinders effective appellate review and invites potentially frivolous bias claims by disappointed litigants" (*id.*).

SUMMARY OF ARGUMENT

The decision below follows an unbroken line of cases upholding the right of newspaper publishers to take over direct distribution of their product and rejecting antitrust challenges by terminated independent dealers. These precedents apply *a fortiori* to The Times' less drastic decision to reverse the downward trend in its home delivery sales by offering potential subscribers an alternate service without replacing the independent distributors.

Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985), on which petitioners place substantial reliance, is not inconsistent with these decisions or at all relevant

to this case. It did not involve a manufacturer's decision to establish direct distribution in competition with independent dealers, but rather dealt with a monopolist's refusal to deal in order to drive its only competitor out of business. Here, in contrast, the "uncontroverted evidence establishes that the T-Routes *created* competition in the home delivery market" (App. 13; emphasis in original), and petitioners' allegations of possible anticompetitive effects at the publishing level "rest solely on . . . speculation" (*id.*).

The conclusion that petitioners had not satisfied their burden of showing a genuine issue of material fact was fully justified, as demonstrated by each of the meticulous and unanimous decisions below. The Petition virtually ignores the trial court's carefully documented analysis of the factual record, affirmed by the court below, and offers only petitioners' own view of the facts—largely unsupported by record references. (*See, e.g.*, Pet'n 25, arguing alleged facts contrary to those found by the courts below in an effort to show that "this case presents the exact situation addressed in *Aspen Skiing*.")

Finally, the rejection below of petitioners' disqualification and vacatur arguments does not raise any issue worthy of review by the Court. As the court of appeals found, the facts here did not warrant disqualification of the special master, and petitioners "wholly fail[ed] to offer an intelligible basis for their claim that the [special master-defense counsel] relationship tainted the district court's judgment" (App. 16). In doing so, the court below expressly recognized and applied the principles enunciated in the federal cases now cited by petitioners.

The Petition should be denied.

ARGUMENT

I.

THE COURT BELOW FOLLOWED A UNANIMOUS LINE OF PRECEDENTS REJECTING ANTITRUST ATTACKS ON VERTICAL INTEGRATION BY NEWSPAPER PUBLISHERS

Newspapers in this country (including The Times) derive most of their revenues from advertising, rather than from circulation, and depend on advertising for their survival. Since advertising revenues depend in turn on circulation volume, newspapers have a critical interest in maintaining attractively low home delivery prices in order to maximize circulation.[7] Independent newspaper distributors generally do not share this interest; on the contrary, their primary concern is in maximizing their subscription revenues even if they come from fewer readers.[8]

Accordingly, in recent years many publishers throughout the country have established systems to sell their newspapers directly to subscribers at uniform standards of service and low prices. Unlike The Times, which was relatively late in its vertical integration and merely established supplemental delivery routes to reverse declining home delivery sales, many of these publishers terminated sales through independent distributors entirely.

These changes prompted various antitrust challenges by disgruntled independent distributors, and more than a dozen

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7 These facts are well recognized. *See Paschall* v. *Kansas City Star Co.*, 727 F.2d 692, 701 (8th Cir.), *cert. denied*, 469 U.S. 872 (1984); *Auburn News Co.* v. *Providence Journal Co.*, 659 F.2d 273, 278 (1st Cir. 1981), *cert. denied*, 455 U.S. 921 (1982); *Knutson* v. *Daily Review, Inc.*, 383 F. Supp. 1346, 1362-63 (N.D. Cal. 1974), *aff'd in part*, 548 F.2d 795 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977).

8 *See Newberry* v. *Washington Post Co.*, 438 F. Supp. 470, 477-78 (D.D.C. 1977), and cases cited in note 7, *supra*. *See generally* Areeda, *Antitrust Law* ¶ 729.7a, at 196-98 (Supp. 1982).

federal court decisions unanimously concluded that forward integration in the newspaper industry does not violate the antitrust laws.[9] As the Court of Appeals for the Eighth Circuit stated *en banc* in 1984: "[W]e find it hard to ignore the fact that every other antitrust case brought against a newspaper publisher challenging the newspaper's decision to forwardly integrate into distribution has been resolved in favor of the newspaper." *Paschall* v. *Kansas City Star*, *supra*, 727 F.2d at 704. All of these holdings are consistent with the general principle that vertical integration, even by a monopolist, does not, without more, offend the Sherman Act. *E.g.*, *id.* at 698; *White* v. *Hearst Corp.*, 669 F.2d at 19.

Given the "uncontroverted evidence" that the T-Route system actually created competition in the home delivery market, and petitioners' failure to demonstrate that the intended or actual effects of the T-Route system were in any way anticompetitive (App. 13), the application below of established principles of law to the record in this case was clearly correct. Petitioners' arguments to the contrary are based on a reiteration of factual allegations which both courts below found either without merit or insufficient to raise a genuine issue for trial. The Petition's demand for a judicial reevaluation of the evidence here is equally non-meritorious.

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9 *E.g.*, *Northwest Publications, Inc.* v. *Crumb*, 752 F.2d 473 (9th Cir. 1985); *Paschall* v. *Kansas City Star Co.*, *supra*; *White* v. *Hearst Corp.*, 669 F.2d 14 (1st Cir. 1982); *Auburn News Co.* v. *Providence Journal Co.*, *supra*; *Knutson* v. *Daily Review Inc.*, *supra*; *Bowen* v. *New York News, Inc.*, 522 F.2d 1242 (2d Cir. 1975), *cert. denied*, 425 U.S. 936 (1976); *Norridge News Agency, Inc.* v. *Chicago Tribune Co.*, 1983-2 CCH Trade Cas. ¶ 65,672 (N.D. Ill. 1983); *Ampar Enterprises, Inc.* v. *Reno Newspapers, Inc.*, 8 Media L. Rep. 1670, 1671 (D. Nev. 1982); *McDaniel* v. *Greensboro News Co.*, 1984-1 CCH Trade Cas. ¶ 65,792 (M.D.N.C. 1983); *Grill* v. *Reno Newspapers, Inc.*, 6 Media L. Rep. 1818 (D. Nev. 1980); *Neugebauer* v. *A.S. Abell Co.*, 474 F. Supp. 1053 (D. Md. 1979); *Newberry* v. *Washington Post Co.*, *supra*; *Hardin* v. *Houston Chronicle Publishing Co.*, 434 F. Supp. 54 (S.D. Tex. 1977), *aff'd per curiam*, 572 F.2d 1106 (5th Cir. 1978); *McGuire* v. *Times Mirror Co.*, 405 F. Supp. 57 (C.D. Cal. 1975); *Lamarca* v. *Miami Herald Publishing Co.*, 395 F. Supp. 324 (S.D. Fla.), *aff'd mem.*, 524 F.2d 1230 (5th Cir. 1975).

In the absence of any conflict among the circuits or indeed with any prior decision in the newspaper industry, petitioners flatly contradict the finding below that T-Routes "*created* competition in the home delivery market" in order to set up their argument that the result below is inconsistent with the prior decision of this Court in *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, *supra*.

Despite petitioners' tortured attempts to squeeze this case into the mold of *Aspen Skiing*, in fact the two cases bear no resemblance. *Aspen Skiing* dealt not with a supplier's decision to supplement retail sales of its own product, but rather with the termination of a long-standing joint marketing arrangement between horizontal competitors in order to eliminate all competition. The *Aspen Skiing* defendant had a conceded monopoly in the relevant market, 472 U.S. at 608; both courts here, in contrast, found petitioners' monopoly allegations to be implausible, unsupported by the evidence, and belied by The Times' uncontroverted showing to the contrary (App. 6-8, 22-26). In *Aspen Skiing*, the defendant failed to offer "any efficiency justification whatever" for terminating its arrangement with plaintiff, 472 U.S. at 608; here, as the district court noted, "The Times has presented unchallenged, legitimate business reasons for the modification of its distribution system and the expansion of its home delivery routes" (App. 27).[10]

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10 Petitioners argued below, without proof, that the reversal of declining circulation did not justify the supposedly exorbitant cost of T-Route operations, so that The Times' true motive must have been the elimination of other publishers by means of destroying independent dealers through predatory pricing. Among other infirmities, this speculation ignored the undisputed facts that newspaper publishing is a unitary business in which revenues are derived almost exclusively from the sale of advertising, and that, like other newspapers, The Times is profitable when (and only when) advertising revenues are considered (JA 1972, 2937). There can be no valid claim of predatory pricing here, since there are neither losses nor any expectation of recovering losses in the form of later monopoly profits. *See Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 588-89 (1986).

In *Aspen Skiing*, moreover, defendant's decision was for the sole purpose of eliminating its only competitor. 472 U.S. at 608. Here, in contrast, the lower courts both recognized that the introduction of T-Routes actually created competition in a home delivery market previously monopolized by high-priced independent distributors such as petitioners (App. 13, 24). Both courts also noted petitioners' failure to rebut The Times' showing (a) that T-Route carriers were free to handle competing publications, and (b) that many local publishers had already demonstrated their ability in institute direct delivery networks (App. 7-8, 30).

As the parties in *Aspen Skiing* did not have a supplier-distributor relationship, this Court had no occasion to discuss (much less alter) the rule that even the elimination of an intrabrand competitor does not render vertical integration unlawful. *E.g.*, *United States* v. *Columbia Steel Co.*, 334 U.S. 495, 525-26 (1948); *United States* v. *Paramount Pictures Inc.*, 334 U.S. 131, 173-74 (1948). The court of appeals correctly applied this established principle to the undisputed facts here.

II.

THE PETITIONERS' CLAIM THAT THE JUDGMENT BELOW MUST BE VACATED IS UNWORTHY OF REVIEW

The petitioners delayed over two years before complaining of the special master's previously disclosed contacts with defense counsel in their third ("appearance of partiality") attempt to unseat the special master. By the time of their fourth attempt, the special master had long since ceased to function on any contested matter for several months, and petitioners' motion was correctly denied as moot.

In affirming the trial court and rejecting petitioners' demand for vacatur of its summary judgment order, the court of appeals concluded (a) that the special master's relationship (or alleged relationship) with respondent's counsel did not rise to a

level requiring disqualification or vacatur and (b) in any event, there was no basis for petitioners' claim that the relationship somehow affected the district court's grant of summary judgment (App. 16-17).

Far from disregarding established principles as to the requirements for disqualification, the court of appeals amply supported its decision with precedents and expressly distinguished the circumstances here from those in other disqualification cases, some of which are now cited by petitioners. (*See id.*) The test elicited by the court from these cases, and which it correctly applied here, is " 'whether an objective, disinterested observer, fully informed of the facts on which recusal was sought, would entertain a significant doubt that justice would be done in the case' " (App. 16, quoting from *Pepsico, Inc.* v. *McMillen*, 764 F.2d 458, 460 (7th Cir. 1985)).

Petitioners' real quarrel is obviously not with the legal principles which the court below applied (indeed, they cite the *Pepsico* case with approval, Pet'n 16), but rather with their application to the facts in this case, which are not now subject to reargument. As the courts below recognized, Mr. Wallace had no personal interest in any party or in the outcome of this case; all material aspects of his relationship with Cahill Gordon were known to petitioners when they consented to his appointment as special master; Mr. Wallace's recommendations as special master were subject to *de novo* review by Judge Zampano, and they had ceased well before argument and submission of respondent's summary judgment motion; moreover, Judge Zampano's opinion on that motion did not rely on any factual findings or legal conclusions made by Mr. Wallace (App. 15-17, JA 1496-97, 1632).

These facts stand in sharp contrast to the circumstances underlying the disqualification rulings invoked by petitioners, which turned on the judicial officer's personal interest in the outcome of a matter over which he presided, or his current, significant and undisclosed business affiliation with one of the parties or their counsel, together with his status as final arbiter

of the issues in a case, without the availability of *de novo* review.

Commonwealth Coatings Corp. v. *Continental Casualty Co.*, 393 U.S. 145 (1968), on which petitioners place heavy reliance, is distinguishable from this case on all of these bases. The disqualified arbitrator in that case had been working as a consultant for defendant over a four- or five-year period, including on the very project that was the subject of the arbitration, and the fact of this relationship was not disclosed at all until the conclusion of the arbitration. In ruling that Section 10 of the United States Arbitration Act mandated vacation of the arbitration award, this Court emphasized that the powers of an arbitrator are greater than that of a judge, since the former was given "free rein" to decide questions of law and fact, unconstrained by a substantive appellate review. 393 U.S. at 149. The facts in the other cases cited by petitioners are similarly remote from those here.[11]

In short, the court of appeals' recognition that the facts in this case "did not rise to the level requiring disqualification" can hardly be deemed a conflict among circuits, as petitioners claim in their attempt to relitigate the facts here.

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11 In *Pepsico Inc.* v. *McMillen*, 764 F.2d 458 (7th Cir. 1985), for instance, the court disqualified a judge who appeared to be seeking full-time employment with one of the firms involved in a pending case. In *Hall* v. *Small Business Administration*, 695 F.2d 175 (5th Cir. 1983), the disqualified magistrate's law clerk had continued to work on a class action even though she was a member of the plaintiff class (with expressed convictions about the merits of plaintiffs' position), and had accepted permanent employment with the firm representing the class. And in *Potashnick* v. *Port City Construction Co.*, 609 F.2d 1101 (5th Cir.), *cert. denied*, 449 U.S. 820 (1980), the judge was disqualified for failing to disclose that the lawyer trying the case was his personal counsel in other matters and was currently involved with him in several real estate investments. *See also Texaco, Inc.* v. *Chandler*, 354 F.2d 655 (10th Cir. 1965), *cert. denied*, 383 U.S. 936 (1966) (judge disqualified when it became known that counsel for plaintiff was representing him in an unrelated civil action); *United States* v. *Nobel*, 696 F.2d 231 (3d Cir. 1982), *cert. denied*, 462 U.S. 1118 (1983) (judge disqualified from presiding over criminal trial because he owned a "substantial interest" in the corporate victim of the alleged crime).

Petitioners also argue that the summary judgment ruling must be vacated, not because of any actual or suspected influence by the special master, but because "it is impossible to know what effect [the special master's] influence had on the District Court's decision".[12] The decision itself demonstrates there was no such effect, and the cases petitioners cite for this extreme proposition are inapposite, at best. In *Aetna Life Insurance* v. *Lavoie*, 475 U.S. 813, 824 (1986), this Court required vacation because a Justice of the Alabama Supreme Court had a " 'direct, personal, substantial, [and] pecuniary' " interest in an appeal in which he wrote the opinion and cast the deciding vote. The Justice was pursuing a lawsuit against one of the parties which involved all of the issues decided in his opinion; moreover, his opinion went well beyond established law and broke new ground on issues relevant to his own lawsuit. In essence, his opinion "had the clear and immediate effect of enhancing both the legal status and the settlement value of his own case". 475 U.S. at 824. Needless to say, these facts are far removed from any even alleged in the instant case.

Petitioners' conclusory attempt to distinguish *Ransom* v. *S & S Food Center Inc.*, 700 F.2d 670 (11th Cir. 1983), is likewise unpersuasive. That case cleary illustrates that vacatur would be inappropriate, even if the special master were disqualified, because Judge Zampano conducted a detailed, independent review of the record before granting summary judgment. The defendants in *Ransom* moved to vacate all prior rulings after the district judge had voluntarily recused himself because his father's law firm represented one of the parties. In affirming the denial of this motion (which it characterized as "frivolous"), the court held that the successor judge's adoption of all previous orders stood as an independent ruling because it was based on his own review of the totality of the evidence.

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12 Notably absent from Petitioners' presentation is a single reference to any submission or act by the special master that allegedly influenced Judge Zampano's summary judgment opinion. Instead, Petitioners speculate, with no record support, that the special master may have had "*ex parte* contacts with the District Court concerning issues of fact and law" (Pet'n 19).

In this case Judge Zampano painstakingly reviewed petitioners' eight-volume opposition to the summary judgment motion and issued a well-reasoned, abundantly-supported decision which did not rely in any respect on proposed findings of fact or conclusions of law supplied by the special master. Judge Zampano himself confirmed that the special master played no role in the determination of the motion (JA 1632), and the court of appeals agreed (App. 17). Under these circumstances, even assuming that petitioners had made out a valid case for the special master's disqualification (which they did not), they could not, as the court of appeals noted, "offer an intelligible basis for their claim" that the district court's judgment was tainted (*id.*).

In sum, for all of the reasons cited by the courts below, there was no basis here for disqualification of the special master, and even if there had been, vacatur would have been improper since he had nothing to do with the summary judgment decision. Accordingly, this case is unworthy of review by this Court.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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RULE 28.1 CERTIFICATE

Respondent The New York Times Company respectfully advises the Court pursuant to Rule 28.1 of the Rules of this Court that it has no parent company and that it has no subsidiaries or affiliates other than wholly-owned subsidiaries.

Callcenter Services, Incorporated ("CSI"), formerly known and sued herein as MCI Corporation, respectfully advises the Court that it has no parent company and that it has no subsidiaries or affiliates.